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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-430

WILLIE J. WOOLFOLK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Page

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI 1

CONCLUSION 7

APPENDIX A –

OPINION of State of New York Court of Appeals, dated 7/8/75 ..... 1a

Order Granting Stay 2a

Constitutional Provisions and Statutes Involved 3a

Order to Show Cause 5a

Affidavit in Support of Order to Show Cause 6a

Transcript of Proceedings Pursuant to Order to Show Cause 10a

Extracts from Petitioner's Brief on Appeal to Broome County Court 17a

Decision of Broome County Court 19a

Extracts from Petitioner's Brief on Appeal to Court of Appeals 21a

TABLE OF AUTHORITIES

Cases:

Argensinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) 5

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 4, 5

Duncan v. Louisiana, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 144 (1968) 4, 5

In re Oliver, 333 U.S. 257, 273, 92 L.Ed. 682, 694, 68 S.Ct. 499 (1948) 5

Mapp v. Ohio, 367 U.S. 643, 881 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) 5

Osborne v. U.S., 351 F.2d 111, 115 4

People v. Mleczko, 298 N.Y. 153, 163 4

Cases, continued: Page

Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 6

Schneble v. Florida, 405 U.S. 427, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972) 6

Speiser v. Randall, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958) 4

U.S. v. Adams, 385 F.2d 548 4

U.S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) 4, 5

Statutes:

28 U.S.C. 1257 2

New York Criminal Procedure Law, Section 310.20 . . . . . 2, 6

Miscellaneous:

Amendment 5, United States Constitution 2, 4, 5

Amendment 6, United States Constitution 2, 4, 5

Amendment 14, United States Constitution 2, 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

WILLIE J. WOOLFOLK,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Willie J. Woolfolk petitions the Court for review of the Order of the Court of Appeals of the State of New York affirming his conviction and sentence by the City Court of the City of Binghamton for a violation of Section 100(1) of the Alcoholic Beverage Control Law of the State of New York, entered on July 8, 1975.

Petitioner respectfully shows:

1. The opinion of the Court below is, as yet, unreported but is appended hereto as Appendix 1 hereof.

2. The order sought to be reviewed was dated and entered on July 8, 1975. Petitioner was granted a forty-five (45) day stay of execution of sentence for the purpose of allowing petitioner to apply to this Court for a writ of certiorari. Said order granting the stay of execution was made and entered on August 1, 1975 by the Hon. Lawrence H. Cooke, one of the Justices of the Court of Appeals of the State of New York. A copy of said order is appended hereto as Appendix 2a-b hereof. Jurisdiction is conferred on this Court by virtue of Title 28 of the United States Code, Section 1257.

3. The questions presented for review are: (1) May a jury in a criminal proceeding, examine and consider evidence neither introduced nor offered at trial without a violation of the right of the petitioner to due process of law? (2) Is Section 310.20 of the Criminal Procedure Law of the State of New York as interpreted and applied by the Court of Appeals violative of the petitioner's right to due process of law.

4. The case involves the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 310.20 of the Criminal Procedure Law of the State of New York. The pertinent texts are set forth verbatim as Appendix 3 hereof.

5. Petitioner was tried for an illegal sale of alcoholic beverages on October 9 and 10, 1973. During the direct case for the People, five cardboard boxes described as containing bottles of liquor confiscated from the petitioner were offered into evidence by the prosecution as People's Exhibit 3. One of the five boxes contained two guns. The guns had neither been introduced nor offered

into evidence. The trial concluded on October 10, 1973 with a guilty verdict. Subsequently, petitioner's trial counsel interviewed a juror and determined that the guns had been discovered by the jury during their deliberations and that the vote for conviction followed upon the heels of that discovery.

6. The Federal question sought to be reviewed was first raised by a post-conviction order to show cause made and entered by the Hon. Walter T. Gorman, City Judge of the City of Binghamton, New York on October 9, 1973. Copies of the said order to show cause and the affidavit of Jerome Nealon, Esq., upon which it is based, are appended hereto as Appendix 4a-e. Mr. Nealon's affidavit concludes with a request that the verdict be set aside "on the grounds that evidence not introduced and offered was allowed into the jury room."

A hearing on the order to show cause was held before the Hon. Walter T. Gorman on October 30, 1973. That Court held that the jurors verdict "was not influenced at all by the fact that a staring pistol or pistols were found in the bottom of Exhibit C which was a box of liquor." A copy of the transcript of the hearing in which the Court questioned the jurors and in which the Court acknowledged that it didn't know and the attorneys didn't know that the pistols were in the exhibit is appended hereto as Appendix 5a-m.

The Federal question sought to be reviewed was raised again on appeal to the Broome County Court from the conviction and sentence in Binghamton City Court. It was raised in the appellant's brief, pertinent portions of which are appended hereto as Appendix 6a-c. The Broome County Court affirmed, without opinion. A copy of that Court's decision is appended as Appendix 7a-c.

Finally, the questions sought to be reviewed were raised on appeal from the judgment affirming conviction by the Broome County Court. In appellant's brief to the Court of Appeals, appellant cited *People v. Mleczko,* 298 N.Y. 153, 163; *Osborne v. U.S.,* 351 F.2d 111, 115 and *U.S. v. Adams,* 385 F.2d 548 for the proposition that fundamental due process requires reversal of a conviction obtained under the circumstances of this case. A copy of appellant's brief is appended hereto as Appendix 8a-h. The Court of Appeals affirmed in a memorandum (Appendix 1) without discussing the due process argument which had also been made at oral argument before that Court.

7. Due Process Argument.

This Court has recently held that the Sixth Amendment guarantee of an accused's right to confront the witnesses against him and to give compulsory process for obtaining witnesses in his favor, and the Fifth Amendment guarantee that no person shall be deprived of liberty without due process of law both, express an accused's right to the production of all evidence at a criminal trial. *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The same guarantees are provided in State criminal proceedings by the Fourteenth Amendment due process clause. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 144 (1968). Thus, a criminal accused is entitled to present evidence of an exculpatory nature, and to challenge evidence of an inculpatory nature.

This Court has recognized that the procedures by which the facts of a case are determined are of the greatest importance, *Speiser v. Randall,* 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958), and that procedural

safeguards are fundamental when they are "basic in our system of jurisprudence." *Duncan v. Louisiana, supra* at 149, 20 L.Ed.2d at 496, quoting *In re Oliver,* 333 U.S. 257, 273, 92 L.Ed. 682, 694, 68 S.Ct. 499 (1948); see *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). Moreover, this Court has acknowledged that:

> "One of the rightful boasts of Western civilization is that the prosecution has the burden of establishing guilt *solely on the basis of evidence produced in court* and under circumstances assuring an accused all the safeguards of a fair procedure. (Emphasis added) *Deutch v. United States,* 367 U.S. 456, 471, 6 L.Ed.2d 963, 973, 81 S.Ct. 1587 (1961), quoting *Irvin v. Dowd,* 366 U.S. 717, 729, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961)."

Such procedural safeguards are embodied, in part, in the rules of evidence, and the fact that such rules are found everywhere in criminal proceedings accentuates their fundamental necessity in the American scheme of ordered liberty. Cf. *Duncan v. Louisiana, supra.* While it is not specifically so stated, the rules of evidence demand that before real evidence is submitted to a jury, first it must be offered in evidence, and the accused must be given the opportunity to oppose its admission. See *Wigmore on Evidence,* Third Ed., Vol. I, Section 17, pp. 313-321; *Jones on Evidence,* Sixth Ed., Vol. 3, Section 15.26, pp. 64-67. The confrontation clause of the Sixth Amendment and the Fourteenth Amendment requires no less. See *U.S. v. Nixon, supra; Chambers v. Mississippi, supra.* And when a criminal accused is not apprised of the existence of evidence that may affect the determination of his innocence or guilt, he cannot challenge the legality of such evidence. See *Mapp v. Ohio,* 367 U.S. 643, 881 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Rights that are

essential to the exercise of fundamental constitutional rights themselves are worthy of constitutional protection. See *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705, reh. den. 410 U.S. 959, L.Ed.2d 694, 93 S.Ct. 1409 (1972). Thus, the presentation of evidence to a jury in a criminal case, especially where there is reason to believe that such evidence had an effect upon the jury, *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972) and where the accused was never apprised of the existence of such evidence violates the rudimentary principles of due process of law.

Much, if not all, of what is received in evidence in a criminal trial is discretionary with the trial judge and rarely appealable. The single procedural safeguard standing between the accused and the evidence admitted against him is the presumptively impartial exercise of the trial judge's discretion. Where, as in this case, the trial judge is unaware of the existence of an exhibit, it is an unconstitutional application of the statutory embodiment of that single procedural safeguard to rule, as the Court of Appeals has done in this case, that it was a proper exercise of judicial discretion to allow a jury to inspect the exhibit. This is especially so where the statute, as here, requires that the exhibit first be received in evidence. *Criminal Procedure Law,* Section 310.20; *Wigmore on Evidence,* Third Ed., Vol. I, Section 16, pp. 310-312.

This case does not involve an erroneous ruling on the admissibility of evidence, and it does not raise the question of whether the error committed was harmless. The issues here raised by petitioner are whether allowing evidence that was neither introduced nor offered into the jury room, in the absence of the exercise of judicial discretion, where it was considered by the jury in a criminal proceeding, violates due process of law.

WHEREFORE, petitioner prays that the Supreme Court of the United States reverse his conviction.

Respectfully submitted,

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Attorney for Petitioner.

Of counsel:

WILLIAM MICHELMAN, ESQ.

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

Broome Cty. Ct. No. 357
The People & c.,
Respondent,
vs.
Willie J. Woolfolk,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM

Defense counsel had ample opportunity to examine the exhibits prior to their being received in evidence. Under these circumstances, the court properly exercised its discretion in allowing the jurors to inspect the exhibits (CPL §310.20) and the inadvertent introduction of the additional matter and review of the same by the jury cannot be said, as a matter of law, to constitute reversible error.

* * * * *

Order affirmed in a memorandum. All concur.

Decided July 8, 1975

PRESENT: HON. LAWRENCE H. COOKE,
Associate Judge
STATE OF NEW YORK : COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff,

-vs-

WILLIE J. WOOLFOLK,
Defendant.

ORDER GRANTING STAY

The parties in this action by their respective attorneys having appeared before me on the 1st day of August, 1975, and the defendant having made a motion pursuant to Rule 27 of the Rules of the United States Supreme Court to stay the execution of the sentence imposed upon the defendant in the above entitled action on November 14th, 1973, pending the determination of the defendant's application for a writ of certiorari to the United States Supreme Court, and the plaintiff having appeared by the District Attorney of Broome County, Frederick Meagher, Jr., Esq., of counsel, and the defendant having appeared by Michael J. Walter, Esq., and after hearing Michael J. Walter, attorney for the defendant, in support of said motion, and Frederick Meagher, Jr., attorney for the plaintiff, in opposition thereto.

NOW, on motion of Michael J. Walter, attorney for the defendant, it is

ORDERED, that the motion be and the same is granted as hereinafter indicated; and it is further

ORDERED, that the stay of execution of the sentence is granted for a period of 45 days for the purpose of allowing defendants to apply to the United States Supreme Court of a Justice thereof for a writ of certiorari; and it is further

ORDERED, that service of a certified copy of this order upon the District Attorney of the County of Broome, State of New York, on or before the 4th day of August, 1975, be deemed good and sufficient service, and that the original order be filed, with proof of service, immediately after service in the Office of the Clerk of the Court of Appeals at Albany, New York by certified mail, return receipt requested.

Dated: August 1st, 1975.

/s/Lawrence H. Cooker
Associate Judge
Court of Appeals

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

CRIMINAL PROCEDURE LAW §310.20

Jury deliberation; use of exhibits and other material.—Upon retiring to deliberate, the jurors may take with them:

1. Any exhibits received in evidence at the trial which the court, after according the parties an opportunity to be heard upon the matter, in its discretion permits them to take; and

2. A written list prepared by the court containing the offenses submitted to the jury by the court in its charge and the possible verdicts thereon.

[Caption Omitted in Printing]

ORDER TO SHOW CAUSE

PRESENT: Honorable Walter T. Gorman, Justice.

On reading the affidavit of Jerome O. Nealon, Esq., sworn to the 19th day of October, 1973, and on motion of Jerome O. Nealon, Esq., attorney for the defendant, it is

ORDERED that the plaintiff herein show cause at a motion term of this court, to be held in and for the County of Brooms, at the City Courthouse in the City of Binghamton, on the 30 day of October, 1973, at 10:30 o'clock in the aforenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made which would set aside the verdict of guilty in this matter and why the defendant should not have such other and further relief as may be just; and it is further

ORDERED that service of a copy of this order and the papers upon which it is granted upon plaintiff's attorney, either personally, or otherwise in accordance with the provisions of Rule 2103 of the Civil Practice Law and Rules, on or before the 19 day of Oct., 1973, shall be good and sufficient service.

Signed this 12 day of Oct., 1973 at Binghamton, New York.

/s/Walter T. Gorman
Walter T. Gorman
Judge of the City Court
City of Binghamton

[Caption Omitted in Printing]

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

STATE OF NEW YORK :
:
COUNTY OF BROOME :

JEROME O. NEALON, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice before all the courts in the State of New York and am the attorney of record for the defendant herein.

2. The defendant was charged with the violation of Section 100(1) of the Alcoholic Beverage Control Law of the State of New York and was tried in the City Court, City of Binghamton on October 9 and October 10, 1973 before Honorable Walter T. Gorman and a jury of six persons. At the conclusion of the trial, the jury then issued its verdict of guilty by a vote of 6 to 0 and was duly polled and all duly answered guilty.

3. Subsequent thereto and on October 11, 1973, your deponent made numerous motions, among them motions to dismiss for lack of jurisdiction, insufficiency of the information, the information being too vague and ambiguous and, various motions to set aside the verdict, including that it was against the weight of the evidence. Motions were also made to vacate the judgment on the grounds the court did not have jurisdiction, the judgment was procured by misrepresentation and/or fraud on the part of the police, material evidence adduced by the people was false and known by them to be false, and material evidence was procured in violation of defendant's right under the New York and U.S. Constitu-

tions. All motions were denied and the deponent took exception to each denial occasion to speak with one Thomas Keating of 22 Allendale Road, City of Binghamton, County of Broome, State of New York, who was one of the jurors at the trial.

5. I am advised by Mr. Keating, after having spoken with him at great length, that the jury was under a misconception that they *had* to return a verdict of either guilty or not guilty. There was no question in their minds but that they had no other choice. In other words, the defendant was precluded from the possibility of returning a "hung jury" or an undecided jury.

6. Mr. Keating claimed that they were dead-locked for an hour and at one point in time the jury was 3 to 3. One person was then convinced to vote in favor of the prosecution and it became 4 to 2.

7. At this point in time, John Klemchik, Jr. of 163 Susquehanna Street, City of Binghamton, County of Broome, State of New York, began removing the various bottles of liquor (which had been allowed into the jury room as people's exhibit number 3 upon the consent of your deponent.) and displaying them to other members of the jury.

8. As Mr. Klemchik removed more and more bottles and placed them outside of the box or container in which they were, there came a point in time when he discovered what Mr. Keating described as two revolvers in the bottom of one of the boxes of liquor. Paraphrasing Mr. Keating, "that was the end of the ballgame."

9. At that point, this inflamed the jury to such a degree that there was no question in the minds of at least five members of the jury (excluding Mr. Keating) but that the defendant was indeed guilty because he had two revolvers!

10. Mr. Keating, still believing that the jury had to return a verdict of either guilty or not guilty and that they had no other choice, was then persuaded by the remaining five members of the jury to cast his vote in favor of a verdict of guilty. Mr. Keating has stated to your deponent that he would have maintained his vote in favor of not guilty if he was aware that he had the right to do so. Your deponent is *not* arguing that this was an inexperienced jury, but, simply that they were unaware that they had the right to *not return* a verdict. This was not made clear to them, according to Mr. Keating.

11. Your deponent respectfully states and alleges to the court that when people's exhibit number 3 was introduced, it was offered as various and miscellaneous boxes and cartons of bottled liquor, wine and cans of beer. No mention was made of the introduction or offering into evidence of the two confiscated revolvers. Your deponent thoroughly believes that he was deceived with regard to the introduction and offering of people's exhibit 3 in evidence and prays to the court that the verdict be set aside on that ground.

12. Again, your deponent offered his agreeable and voluntary consent to allow the jury to look at, in the jury room, the evidence, including among it, the people's exhibit number 3. It was in this people's exhibit number 3 that the two revolvers were discovered and so inflamed the jury. Your deponent contends on behalf of defendant that this so poisoned the minds of the jury that there could be no other result than a verdict of guilty. Your deponent prays to the court that the jury verdict be set aside in light of the evidence of the pistols, which was either mistakenly offered and introduced or fraudulently offered and introduced.

13. Your deponent would not have agreed and consented so voluntarily and willingly to either the introducing and offering into evidence of people's exhibit 3 or to the allowing of people's exhibit 3 into the jury room if he had known that it contained, hidden at the bottom of the box, the two pistols which rirulently distorted the jurys' minds.

WHEREFORE, your deponent prays to the court that the jury verdict be set aside on the grounds of misconception of the charge as to the kinds of verdicts that may be returned; that it be set aside on the grounds that it is against the weight of the evidence; that it be set aside on the grounds that evidence not introduced and offered was allowed into the jury room; that it be set aside on the grounds that evidence not received into evidence by the court was allowed into the jury room and lastly, that it be set aside on the grounds that the jury was so inflamed by the unauthorized material that it was rendered not an impartial jury.

/s/Jerome O. Nealon
Jerome O. Nealon

Sworn to before me this
day of October,
1973.

TRANSCRIPT OF PROCEEDINGS PURSUANT TO ORDER TO SHOW CAUSE

STATE OF NEW YORK : COUNTY OF BROOME
CITY COURT : CITY OF BINGHAMTON

PEOPLE OF THE STATE OF NEW YORK

Plaintiff

-vs-

WILLIE J. WOOLFOLK,

Defendant

At a Hearing held pursuant to an Order to Show Cause, filed by Jerome O. Nealon, attorney for the Defendant, to look into and ascertain whether or not any outside influence affected the jury's verdict, at City Court, City of Binghamton, Broome County, New York, on the 30th day of October, 1973, before HON. WALTER T. GORMAN City Court Judge.

APPEARANCES: PATRICK MONSERRATE,
District Attorney
Office and Post Office Address
Court House,
Binghamton, New York

By JON BLECHMAN,
Asst. District Attorney
Attorney for the Plaintiff.

JEROME O. NEALON, Esq.
Attorney for the Defendant
Office and Post Office Address
134 Front Street,
Binghamton, New York

---

[2] (All jurors were questioned independently).

Juror FLORENCE HOTALING, being duly sworn testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN

Q. Your name is Florence Hotaling? A. Right.

Q. You were a member of the jury in the case of People versus Willie Woolfolk? A. Right.

Q. Do you recall what your verdict was on that case? A. Yes, guilty.

Q. Did you inspect the exhibits that were sent into the jury room? A. Yes.

Q. Do you recall anything unusual about those exhibits? A. Yes, they were old bottles.

Q. Anything else that you can think of? A. No stamp on to the beer.

Q. Were you surprised by any exhibit that you didn't expect to see? A. Not that I recall.

Q. Did you see any guns in the jury room? A. Yes.

Q. Were you surprised to find them? A. Yes.

Q. Where did you find them? A. In the box with the liquor.

[3] Q. I will just ask you right out, could the fact that you found these guns in a box with other exhibits, with the liquor, have any influence on your verdict in that case? A. No.

Q. None whatsoever? A. No.

THE COURT: Gentlemen, any questions?

MR. BLECHMAN: No.

MR. NEALON: No.

(Mrs. Hotaling was excused).

Juror Frances Jennings, being duly sworn testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN

Q. Your name is Frances Jennings? A. Right.

Q. You were a member of the jury in the case of the People versus Willie Woolfolk? A. Yes.

Q. Do you remember what your verdict was? A. Yes.

Q. Was it, guilty? A. Yes.

Q. During the course of your deliberations in the jury room, did [4] you inspect the exhibits that were sent in? A. Yes.

Q. Did you notice anything unusual about the exhibits? A. I don't know what you mean by unusual.

Q. Did you see anything that you didn't expect to see? A. I didn't have any expectations at all. This is my first experience. I know nothing about it.

Q. Did you notice any guns in the exhibits? A. Somewhere, one time or another I saw a gun but I don't know whether it was in here or in there.

Q. All right. Let me ask you this, could the fact that you did see this gun either here or in the jury room, have any bearing on your verdict of guilty? Did it have any effect on it? A. No, I don't think anything was said about guns regardless.

THE COURT: Any questions gentlemen?

MR. BLECHMAN: No.

MR. NEALON: No.

(Mrs. Jennings was excused).

Juror JOHN C. MOLLEN, being duly sworn testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN

Q. Your name is John Mollen? A. Right.

[5] Q. You were a member of the jury in the case of the People versus Willie Woolfolk? A. Yes.

Q. Do you remember what your verdict was? A. Yes, guilty.

Q. Did you inspect the exhibits in the jury room? A. Yes.

Q. Do you recall anything unusual about them? A. No, not particularly.

Q. Did you see anything that you did not expect to see? A. We saw those pair of guns, or target things I didn't expect to see.

Q. Could the fact that you saw these target pistols or what have you in the jury room, have any bearing or any effect on your verdict? A. No, it didn't. I think I was the one who first discovered them. I thought it was unusual to find them there because they had not been mentioned. That was all.

THE COURT: Any questions gentlemen?

MR. BLECHMAN: No.

MR. NEALON: No.

(Mr. Mollen was excused).

[6] Juror JOHN KLENCHICK JR. being duly sworn testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN

Q. Your name is John Klenchick? A. Yes.

Q. You were a member of the jury in the case of the People versus Willie Woolfolk? A. I was.

Q. Do you recall your verdict? A. Yes.

Q. What was that? A. Guilty.

Q. Did you inspect the exhibits that were submitted to you in the jury room? A. Yes.

Q. Do you recall anything unusual about them? A. No.

Q. Did you see anything you did not expect to see? A. That I didn't expect to see? Not really.

Q. Did you notice or were you made aware, or did you see any target pistols or firearms. A. I believe we seen one. Yes.

Q. Did you feel this was unusual? A. No.

[7] Q. Here's the question. Could the fact that you saw these pistols or firearms, or these target pistols have

any bearing or effect on your verdict? A. It was on my mind. It was part of the evidence. We were looking at the evidence, the beer and the whiskey. That was all.

THE COURT: Gentlemen?

MR. BLECHMAN: No questions.

MR. NEALON: No questions.

(Mr. Klenchick was excused).

Juror QUIRINO PELLICCOTTI being duly sworn, testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN:

Q. Your name is Quirino Pelliccotti? A. Yes.

Q. Were you a member of the jury in the case of the People versus Willie Woolfolk? A. Right.

Q. Do you recall your verdict? A. Right.

Q. What was your verdict? A. Guilty.

Q. Did you examine the exhibits sent into the jury room? [8] A. The liquor and the beer, yes.

Q. Did you notice anything unusual or did you see anything you did not expect amongst those exhibits in the jury room? A. There was a starting pistol or something, sort of a gun.

Q. Could the fact that you saw this target pistol have any bearing or any effect on your verdict in this case? A. No.

Q. It didn't have any bearing? A. No.

THE COURT: Gentlemen?

MR. BLECHMAN: (No answer)

MR. NEALON: (No answer)

(Mr. Pelliccotti was excused).

Juror THOMAS F. KEATING being duly sworn testifies as follows:

INTERROGATION BY HON. WALTER T. GORMAN

Q. Your name is Thomas Keating? A. Right.

Q. Were you a member of the jury in the case of the People versus Willie Woolfolk? A. Right.

Q. Do you recall your verdict? A. Guilty.

[9] Q. Do you recall seeing anything unusual about the exhibits sent into the jury room? A. Yes.

Q. Do you recall what they were? A. Yes.

Q. What. A. Cellophane bag with two guns in it.

Q. Were you rusprised to find them there? A. Yes.

Q. Here's the question. Could the fact that you found these guns in the cellophane bag mixed in with the rest of the exhibits in the case, have any bearing or effect on your verdict in this case? A. In my own words? May I say.

Q. Yes. A. I only give my own opinion. Yes. But to what extent they did in the final analysis I don't know.

Q. I will ask the question again. Could the fact that you found the pistol in the cellophane bag mixed in with the exhibits, have any bearing on your verdict in this case? A. For a time they did, Judge. Do I have to explain or elaborate? We were in doubt the whole jury, as to why they [10] weren't presented to the jury as part of Exhibit C. John, when he lifted them up said, "Why, what's this?" We couldn't figure out why the pistols were there and we hadn't had any mention of them in the case. But later in our deliberations, listening to the other jurors it was my opinion I would be right in voting him guilty.

Q. Let me ask you this. Was your verdict of guilty, influenced in any way by the fact that you found these pistols amongst the exhibits? A. For a while. I don't know how to answer that really. The rest of the deliberation, Judge, made it seem to me that there would be a just verdict of guilty.

THE COURT: Any questions gentlemen?

Q. Tom, did the finding or seeing of this starting pistol or what have you, in the cellophane bag, have any influence on your ultimate verdict? A. I did think that the rest of the situation, and I listened very carefully to

the other five for their opinion, was the word overwhelming. I thought the rest of it was more important to an extent.

Q. One of the attorneys talked to you after about the case,—Mr. Nealon? A. He called my wife and asked to get in touch with me, yes.

[11] Q. The fact that he called you and when he called you, did he ask you to say anything with respect to this case? A. Not that I can recall, not in the least, and before I talked with Mr. Nealon, I consulted with an attorney to see if it was right. I had a great precedent—a former retired Supreme Court Justice, when he was an attorney I was on the—he called me in before he left the court room. He asked me . . .

Q. You are talking about Mr. McAvoy? A. Right.

THE COURT: Thank you.

(The six jurors were asked to return to their seats in the jury box).

THE COURT: Ladies and gentlemen, first of all, thank you very much for coming back this morning. This was a problem which comes up now and then. It is a little unusual and we have to solve things. The whole thing is whether or not consideration of the verdict was influenced by the starting pistol found in the box of liquor. To be perfectly frank, I didn't know it was there nor did the attorneys. Not one of us knew. It was [12] quite unusual. That's what we have to figure out. We ascertained this answer now and we will discharge you. The only thing is, please don't discuss this with anyone particularly the newspapers. Okay? You are now discharged.

(Jurors were excused).

THE COURT: After questioning each one of the jurors in this case, the Court ascertained their verdict was not influenced at all by the fact that a starting pistol or

pistols were found in the bottom of Exhibit C which was a box of liquor. I assume you want to take an exception on that ruling.

MR. NEALON: Yes, your Honor. I would like to take the opportunity to submit a brief to the Court in support of the affidavit and order to show cause.

THE COURT: I will adjourn sentencing until the 7th of November, a week from tomorrow, at 10 A.M. if you want to submit a brief.

[13] STATE OF NEW YORK
COUNTY OF BROOME

This is to certify that the foregoing transcript of the hearing held in the matter of the People of the State of New York versus Willie J. Woolfolk on October 30, 1973, is a true, accurate and complete transcript of my stenographic notes taken at the aforesaid time and place.

/s/Margaret E. Polumbo

EXTRACT FROM PETITIONER'S BRIEF ON APPEAL TO BROOME COUNTY COURT

* * *

3. People's Exhibit #3

This consisted of "an assortment of beer, whiskey, scotch, bourbon, wine, and mixing soda. "(O'Neil, transcript, P. 36). Defendant did not object to its introduction and receipt into evidence, and, eventually, into the Jury Room. After the trial was completed, a verdict returned, and motions made, it was discovered that Exhibit 3 also contained two guns down in the bottom of one of the cartons. Defendant's position is

that this was misrepresentation by the People, and, as a direct result of it, the jury became turned against the defendant and this led them to vote unanimously a verdict of guilty.

Defendant was originally charged with violations for 100(1) of the Alcoholic Beverage Control Law between 11:45 P.M. and 1:50 A.M., March 24–25, 1973. Until amended over objection of the defense, no mention was made of where.

The most stringent sufficiency requirement are those imposed for the sufficiency of the information. The allegations of fact in an information must provide reasonable course to believe most the defendant committed the offense charged in the accusatory part of the information. Non-hearsay allegations of the factual part of the information must establish, if true, every element of the offense charged and that the defendant did it. An information sufficient on its face must state a legally sufficient case. (Rothblatt, *Criminal Procedure Law*)

Defendant submits that the information was prima facie insufficient.

B. EVIDENCE IN JURY ROOM WHICH WAS NEITHER INTRODUCED NOR RECEIVED

People's Exhibit 3 was offered and received into evidence without any objection by defendant. Supposedly this contained beer, whiskey, scotch, bourbon, wine and mixing soda.

But in fact it contained more. It contained the guns or pistols confiscated from the defendant's place of business on the night of the raid, but which formed no part of the basis for this trial or charge and in fact, no other trial or charges against the defendant.

Defendant argues that the mere fact, by itself, that these guns were found in the jury room is reason enough without anything else to set aside the verdict and order a new trial. There should be nothing in the jury room and certainly no tainted evidence: an exhibit containing more than introduced or received.

Defendant contends that the pistols were either mistakenly or fraudulently offered and introduced, and, in either case, warrant a ruling that the verdict should be set aside.

After the discovery of the pistols by defense caused, an Order to Show Cause was served from Hon. Walter T. Gorman on the 19th of October, 1973, asking that the verdict be set aside. A hearing was held on this matter during which the jurors were examined by the Court as to whether or not this (guns) had any bearing on their verdict to which they replied, in words or substance, no.

Defendant argues that that is a separate issue, appealed from also over and above the issue as to whether the verdict should be set aside because of the discover of the guns.

* * *

[Caption Omitted in Printing]

DECISION OF BROOME COUNTY COURT

STEPHEN SMYK, J.

Defendant appeals the judgment of the City Court of Binghamton, New York, convicting him after a jury trial of the Illegal Sale of an Alcoholic Beverage in violation of Section 100 subdivision 1 of the Alcoholic Beverage Control Law.

At trial, People's Exhibit 3 was offered and received into evidence without any objection by defendant. Supposedly, the exhibit contained beer, whiskey, scotch, bourbon, wine and mixing soda. However, without knowledge of either party or the court, it also contained two guns or pistols which were not introduced nor received into evidence. Upon retiring to the jury room for its deliberation, the jury took with them the exhibit, including the pistols, pursuant to CPL 310.20(1).

Defendant argues that the mere fact, by itself, that these guns were found in the jury room is reason enough for us to set aside the verdict and order a new trial. The People contend that the alleged error is harmless in light of the overwhelming evidence against the defendant and in view of the fact that a hearing was held on the matter during which the jurors were examined by the court and the attorneys as to whether the presence of the guns had any bearing on their verdict to which each replied in words or substance, that it had not.

Affirmed without opinion.

/s/Stephen Smyk
Broome County Judge

Dated: June 26, 1974.

EXTRACTS FROM PETITIONER'S BRIEF ON APPEAL TO COURT OF APPEALS

* * *

QUESTION PRESENTED

THE DELIVERY TO THE JURY FOR THEIR CONSIDERATION AN INFLAMMATORY EXHIBIT NOT RECEIVED IN EVIDENCE CONSTITUTES REVERSIBLE ERROR.

Section 310.20 of the Criminal Procedure Law provides, in part:

> "Upon retiring to deliberate, the jurors may take with them:
>
> 1. Any exhibits *received in evidence* at the trial which the court, *after according the parties an opportunity to be heard* upon the matter in its discretion permits them to take;"[1]

The purpose of the statute, as construed by decisions under its predecessor, Section 425 of the Code of Criminal Procedure is "to prevent unsupervised use of exhibits in the jury room if the defendant does not consent."[2] A violation of the statute has been held to constitute substantial error, as a matter of law.[3]

In the case at bar, the guns which were found in the box containing People's Exhibit 3 were concededly not in evidence. No consent could have been given by the

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[1] Emphasis added.

[2] People v. Bartone, 12 Misc.2d 926, 929.

[3] People v. Dockum, 285 App. Div. 510, 513; People v. Snyder, 297 N.Y. 81, 92.

defendant pursuant to the statute because the defendant and the Court was unaware of the existence of the weapons until after the trial was concluded and the jury was discharged. For the same reason, the Court could not have exercised the discretion mandated by the statute.

Only a strained construction of the statute could permit such a blatant abuse of the legislative mandate. The Court below stressed the fact that there was "overwhelming evidence of the defendant's guilt". As Judge Fuld wrote in *People v. Mleczko*:[4]

> "Vicious though the crime was, convincing though the evidence of guilt may seem to be, we could affirm only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of a defendant's guilt. We are not prepared to announce such a doctrine."

Here, the crime is a minor one, the alleged illegal sale of a can of beer. Should this defendant be denied due process of law for the sake of a conviction such as this?

The hearing conducted by the trial judge some days after the verdict is likewise insufficient to avoid the clear mandate of Section 310.20. Criminal statutes are subject to strict interpretation and the rights of an accused will be preserved accordingly.

Mr. Nealon's affidavit[5] indicates that at least one juror was affected by the unlawful exhibit and that he felt other jurors were likewise affected. There will always be a doubt in this regard no matter how many hearings are held after the fact.

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[4] 298 N.Y. 153, 163.

[5] Pages A294-A297 of the record on appeal.

The delivery to the jury for their consideration of an inflammatory exhibit not received in evidence, such as the guns in this case, constitutes reversible error which entitles this defendant to a new trial.[6]

CONCLUSION

THE DECISION OF THE COUNTY COURT, BROOME COUNTY, AFFIRMING THE CONVICTION OF THE DEFENDANT SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

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[6] Osborne v. U.S., 351 F.2d 111, 115; U.S. v. Adams, 385 F.2d 548; People v. Snyder, op. cit.; People v. Whitmore, 257 N.Y.S.2d 787, 45 Misc.2d 506, rev'd 278 N.Y.S.2d 706, 27 App. Div.2d 739; People v. Diaz-Rosa, 253 N.Y.S.2d 736, 22 App. Div. 2d 755.